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**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

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No. 00-1592

UNITED STATES,
Appellee,

v.

ADALBERTO BONILLA, a/k/a Eddie,
Defendant-Appellant

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**JUDGMENT**

Entered: April 9, 2001

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgement of the District Court is Affirmed.

By The Court

PHOEBE MORSE

Clerk

[CC: Joseph S. Oteri and S. Theodore Merritt]

**[Not for Publication - Not to be Cited as Precedent]**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

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No. 00-1592

UNITED STATES,

Appellee,

v.

ADALBERTO BONILLA, A/K/A EDDIE,

Defendant-Appellant

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APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

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Before

Boudin, Stahl, and Lynch,
Circuit Judges.

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Joseph S. Oteri, with whom Oteri, Weinberg & Lawson, Kimberly Homan, and Sheketoff & Homan, were on brief, for appellant.

S. Theodore Merritt, Assistant United States Attorney, with whom Amy B. Lederer, Assistant United States Attorney, and Donald K. Stern, United States Attorney, were on brief, for appellee.

April 9, 2001

**Per curiam.** In this appeal, defendant-appellant Alberto Bonilla urges us to vacate his convictions under Fed. R. Crim. P. 52(b) on the ground that jury instructions to which he lodged no objection were plainly erroneous, affected his substantial rights, and "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings" in which he was convicted. United States v. Olano, 507 U.S. 725, 736-37 (1993)(describing situations in which appellate courts should exercise the limited power Rule 52(b) confers)(internal quotation marks omitted). Bonilla makes two specific arguments in support of this request in his well-written appellate brief. First, he argues that the instructions on Count IV, which charged him with aiding and abetting the use and carrying of a firearm during and in relation to the specific federal crimes charged in Counts I-III, constructively amended the indictment by permitting him to be convicted of aiding and abetting the use and carrying of a

firearm during and in relation to one or more uncharged offenses. Second, he asserts that the instructions on reasonable doubt, which in several instances juxtaposed the concepts of guilt and innocence, undercut the presumption of innocence and reduced the government's burden of proof. See, e.g., United States v. DeLuca, 137 F.3d 24, 37 (1st Cir. 1998)(cautioning against use of the term "innocence" in reasonable doubt instructions because it might prompt the jury "to convict where the evidence, though inadequate to prove guilt beyond a reasonable doubt, nonetheless indicated that the defendant may not have been 'innocent'")(citation omitted); United States v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995)(similar); United States v. Mendoza-Acevedo, 950 F.2d 1, 4 (1st Cir. 1991)(similar).

We have read the record and conclude that, even if the challenged instructions were less than ideal, this is not a case that warrants an exercise of our discretion to notice any errors under Rule 52(b). With respect to the instructions on Count IV, it suffices to observe that it was all but undisputed that the home

invaded by Bonilla's confederates was targeted because it was thought to contain drugs and drug money, and that the evidence was more than sufficient to support the conclusion that Bonilla aided and abetted the use and carrying of the firearms employed in this home invasion. Thus, notwithstanding the absence of unanimous verdicts on Counts I-III and the jury's question about drugs, we do not regard the conviction on Count IV as a "miscarriage of justice" within the meaning of Olano. See 507 U.S. at 736-37. With respect to the reasonable doubt instructions, it suffices to note that the instructions as a whole clearly explained the presumption of innocence and repeatedly emphasized the government's burden of proof. We thus are confident that the instructions adequately informed the jury that it should not convict Bonilla unless it was satisfied that the government had proved him guilty beyond a reasonable doubt. See, e.g., DeLuca, 137 F.3d at 37; Andujar, 49 F.3d at 24-25; Mendoza-Acevedo, 950 F.2d at 4-5.

Affirmed.

**United States Court of Appeals**
**For the First Circuit**

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No.00-1592

UNITED STATES

Appellee

v.

ADALBERTO BONILLA, a/k/a Eddie

Defendant - Appellant

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Before

BOUDIN, Chief Judge
TORRUELLA and SELYA, Circuit Judges
STAHL, Senior Circuit Judge
LYNCH and LIPEZ, Circuit Judges

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**ORDER OF THE COURT**
**Entered: August 23, 2001**

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The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the

suggestion for rehearing en banc, be denied.

By the Court:

_____

Janice O'Neil, Acting Clerk.

**CC: S. Theodore Merritt, Esq.**
**Dina Michael Chaitowitz, Esq.**
**Geoffrey G. Nathan, Esq.**
**Joseph S. Oteri, Esq.**

**Fifth Amendment, United States Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**18 U.S.C. §924(c). Penalties**

* * * * * *

**(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -

**(i)** be sentenced to a term of imprisonment of not less than 5 years;

**(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

**(iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

**(B)** If the firearm possessed by a person convicted of a violation of this subsection -

**(i)** is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

**(ii)** is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term

of imprisonment of not less than 30 years.

**(C)** In the case of a second or subsequent conviction under this subsection, the person shall -

**(i)** be sentenced to a term of imprisonment of not less than 25 years; and

**(ii)** if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

**(D)** Notwithstanding any other provision of law -

**(i)** a court shall not place on probation any person convicted of a violation of this subsection; and

**(ii)** no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

**(2)** For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

**(3)** For purposes of this subsection the term "crime of violence" means an offense that is a felony and -

**(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

**(B)** that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

**(4)** For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

* * * * * *

**18 U.S.C. §1951. Interference with commerce by threats or violence**

**(a)** Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

**(b)** As used in this section--

**(1)** The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

**(2)** The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

**(3)** The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between

points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.